Filed 9/28/15 P. v. Gallegos CA3

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. DIEGO ROSALIO GALLEGOS, Defendant and Appellant.	C071201 (Super. Ct. No. SF105481A)

Seven-week-old S.G. nearly died after being brutally abused. When her parents, defendant Diego Rosalio Gallegos and Shaniah Denise Phillips, finally brought her to the hospital she was in critical condition and barely breathing. Extremely malnourished, she had nearly 24 broken ribs, deep lacerations to multiple fingers on each hand, and diaper rash so severe that the skin in her anal and genital area was extremely excoriated and rubbed raw. Both her left femur bone and her right tibia bone were broken. Her body was toxic with infection.

Defendant was charged with torture (Pen. Code, § 206; unless otherwise stated, section references that follow are to the Penal Code), corporal injury to a child (§ 273d, subd. (a)) with great bodily injury enhancements (§ 12022.7, subd. (d)), and child abuse/endangerment (§ 273a, subd. (a)). At trial, the People argued that either defendant inflicted the injuries on S.G. or aided and abetted Phillips in doing so.

We note that, except for the count for corporal injury to a child based on the finger injuries, Phillips was similarly charged. She pleaded guilty under a plea agreement and is not a party to this appeal.

Defendant was convicted of all charges. The jury found true special allegations that defendant personally inflicted great bodily injury on S.G. by fracturing her ribs and cutting her fingers, but found the allegations that he personally inflicted great bodily injury on her regarding the broken femur or tibia fracture not true. Defendant was sentenced to an aggregate term of life with the possibility of parole plus a determinate term of seven years, four months.

On appeal, defendant argues the court prejudicially misinstructed the jury on aider and abettor liability and that insufficient evidence supports his torture conviction. He also contends the court erroneously imposed or stayed certain fees or fines and surcharges, a point conceded by the People, and that the court miscalculated his custody credits for time spent in section 1368 custody. We shall modify the judgment to impose a $240 parole revocation fine, strike an unauthorized $24 surcharge on the restitution fine, impose a $40 court security fee and $30 court assessment fee for counts 2 through 6, which were stayed under section 654, and order a modification to clarify the abstract of judgment. We otherwise affirm the judgment.

FACTS AND PROCEEDINGS

A. The Parents and their Children

Defendant met Phillips when she was 15 and living in a girls group home. At the time, defendant was 37 and lived with his elderly parents in Morgan Hill. He had two children from a previous relationship but they lived with their mother.

Phillips ran away from the group home and moved in with defendant and his parents. Their relationship was often contentious and violent. Phillips would break things and throw them at defendant during fights. She threatened him with a knife during one argument.

Personal conflicts arose between Phillips and defendant's parents, and Phillips eventually moved to Stockton. Defendant remained in Morgan Hill, but would visit Phillips every other week and stay for three or four days at a time.

In 2006, they had a daughter, Sel. G. At one point, Child Protective Services met with defendant and Phillips because Sel. was malnourished.

In June 2007, defendant and Phillips had S.G. She was healthy at birth. Defendant travelled to Stockton the next day and remained for several days helping care for Phillips and the children. As before, defendant would stay with Phillips in Stockton for three or five days and then return to Morgan Hill.

While Phillips allegedly liked Sel., according to defendant, Phillips began claiming that S.G. was not their baby. She told him that she "hate[d]" the "little bitch." Phillips sometimes left S.G. alone in the closet because the baby's crying annoyed her. Despite such statements and actions, and knowing her violent tendencies, defendant nonetheless continued to leave S.G. alone with Phillips when he returned to the bay area.

B. The American Idol Audition

When S.G. was a little over a month old, defendant drove Phillips and the children to San Diego so Phillips could audition for American Idol. He stayed in Stockton July

27, 2007, and they left for San Diego on July 28. After an unsuccessful audition on July 30, the family drove back to Stockton. Defendant remained in Stockton from July 30 to August 4, when he returned to Morgan Hill to ask his parents for money to help pay Phillips's rent. Defendant returned to Stockton on August 5 to pay the rent and stayed with Phillips and the girls until August 8.

C. The Arrival at the Hospital

On the morning of August 8, S.G. was having difficulty breathing, and, according to defendant, she looked purple or blue. She also looked very skinny and was hardly moving.

Defendant asked a neighbor for a ride to the hospital because his baby was sick. The neighbor offered to call 911, but defendant told him "no," and that it was not that "big of a deal."

Although S.G. could not breathe and was pale and weak, defendant gave her a bath and then took a shower himself. Phillips gave Sel. a bath and then Phillips took a shower. Another neighbor finally drove the family to the hospital around noon.

When they arrived, defendant handed S.G. to the triage nurse saying something was wrong with her. S.G. was pallid and barely breathing. Recognizing she was in severe respiratory distress, the nurse rushed S.G. back to the emergency room for immediate treatment.

Defendant and Phillips were placed in a family room across the hall. The nurse would periodically update them on S.G.'s treatment and condition. The nurse did not remember seeing defendant for very long and believed he left the hospital after 10 or 15 minutes. Phillips remained in the family room with Sel., and later spoke with police.

S.G.'s grave condition required more specialized care so she was flown to Children's Hospital in Oakland. There, she was treated by Dr. Crawford, a board

certified pediatrician and the medical director of the child abuse unit at Children's Hospital.

D. S.G.'s Medical Condition

When Dr. Crawford initially examined S.G., she was unable to breathe on her own due to extensive rib damage. She had nearly two dozen broken ribs. Such injuries in very small infants typically result from a violent squeezing or crushing event.

Given the various stages of healing shown on x-rays, Dr. Crawford opined that some of the ribs were broken about two to four weeks before S.G. was brought to the hospital on August 8. The earliest these injuries would have occurred was around July 11. These older injuries were known as non-acute fractures. Other broken ribs showed no signs of healing. These acute rib fractures occurred sometime within the last week before S.G. was treated. The most recent rib fractures caused S.G. to develop chest "flail," meaning her rib cage could no longer support her lungs thus leading to significant difficulty breathing.

S.G. also had numerous other injuries. Her left femur bone was broken in half. It "was completely disconnected from itself as if you broke a pencil into two pieces." Because the femur fracture showed no signs of healing, Dr. Crawford believed the injury had occurred within seven to 10 days of August 8.

The femur injury resulted in extreme swelling and infection in her left thigh. This swelling was even more noticeable when compared with her right leg because S.G. was significantly malnourished. She ranked in only the third percentile for weight for similarly aged infants. In other words, out of 100 babies born at the same time as S.G., 97 of them weighed more than she did.

S.G.'s right tibia was also broken. The bone had essentially been "torn off." The injury was consistent with someone violently pulling on S.G.'s leg. Like the femur

fracture, the tibia break showed no signs of healing. Dr. Crawford opined it occurred no more than seven to 10 days before August 8.

Many of S.G.'s fingers were also deeply lacerated. The cuts were so deep that S.G. suffered ligament damage. The cuts were consistent with someone biting S.G.'s fingers. S.G. likely received the injuries to her fingers a few days before she arrived at the hospital.

S.G. also had extremely raw or "denuded" skin in her genital area from "profoundly bad dermatitis." Dr. Crawford believed the injury was caused by being left for days in a diaper soiled with feces and urine.

Based on his extensive experience with pediatric abuse cases, Dr. Crawford believed S.G. had suffered "one of the most brutal and extreme forms of child abuse [he had] ever seen." She was hospitalized for months, unable to breathe or eat on her own. She was given so much morphine to help manage her pain that she later had to be weaned off the narcotic, which was not typical for child abuse cases. Future surgeries are needed to correct a significant leg length discrepancy and to reattach tendons in her fingers.

E. Defendant's Statements to Police

Police began looking for defendant shortly after he left the hospital on August 8. While police were executing a search warrant at Phillips's apartment that night, defendant called. A Stockton police detective answered and recorded the conversation.

Defendant claimed he left the hospital to be with S.G. when she arrived in Oakland. He also told the detective he noticed S.G.'s leg was "swollen really bad" two or three days before they brought her to the hospital. He then said he noticed her leg was severely swollen the night of August 7. He thought a spider bite caused the swelling.

According to defendant, S.G. was eating fine and she appeared well when he arrived back at the apartment on August 5, having returned from Morgan Hill with rent money. He claimed he and Phillips often bathed S.G. in the morning and at night.

Defendant contacted Stockton Police again two days later on August 10. Police recorded the conversation. Defendant told officers that he cared for his elderly parents. He talked about Phillips's troubled home life and their violent relationship, which was often fraught with jealousy over his contact with his other children and their mother. Defendant said he had spoken with Phillips and that she said she told police he had grabbed S.G. and kicked her in the ribs. He denied it. But he admitted to dropping S.G. on either August 6 or August 7 while playing with her on the rug.

When questioned why he left the hospital in Stockton, defendant said he was scared. He then said he left so someone would be with S.G. when she was transferred to Oakland. Although the officer offered to take defendant to visit the critically injured child in the hospital, defendant first wanted to speak to an attorney because he feared being taken into custody.

After police traced the call to a home in Pleasanton, Stockton police executed a search warrant and arrested defendant. He was returned to Stockton and questioned by police.

During the interrogation, defendant again claimed he left the hospital to go to Oakland so he could be there for S.G. after she was transferred. He admitted, however, that he did not know where in Oakland they were transferring her, he did not ask anyone for such information before he left, and did not tell anyone except for Phillips, who he claimed did not hear him. He never went to the hospital in Oakland. He considered going to Texas to visit his aunt and had asked his mother about obtaining his birth certificate so he could go to Mexico, but denied he was trying to escape.

In discussing S.G.'s care, defendant said he often helped feed and change her. He also regularly bathed her. Only he and Phillips cared for S.G., and when he was around they were always together. Defendant claimed she drank a whole bottle of formula every 30 or 40 minutes. Upon further questioning, however, he admitted he had not fed her that often.

When questioned about S.G.'s broken leg, defendant said he noticed it was swollen around the time the family returned from the American Idol audition on July 30; he again blamed the swelling on a spider bite. She seemed more fussy than usual during the trip. He said his older daughter fell on S.G. several times, but later agreed that did not cause the baby's leg injury.

Although the leg swelling was getting worse, defendant did not take S.G. to a doctor because Phillips did not want to "do all that right now." Instead, they rubbed Vic's [*sic*] on her leg.

Besides the swollen leg, defendant said he did not notice any other bruises or injuries on S.G. when he bathed her before taking her to the hospital. He later conceded that he saw her cut fingers and bruised toes. When told that doctors believed the finger lacerations were caused by a human bite, defendant admitted putting his daughter's fingers in his mouth, although he claimed he did it playfully and did not bite down with any force. He acknowledged "gently" grabbing her toes.

He also admitted that she had been coughing up blood at least three to six days before they took her to the hospital. He did not consider taking her to the doctor even though he recognized this was "not normal."

Defendant also said S.G. did not have a diaper rash before August 8, but then later conceded she had a "little" diaper rash, and that a more severe rash started about three to five days before he took her to the hospital. He did not take her to the doctor, however, because he did not want to have to "deal" with Phillips.

He described squeezing S.G. tightly when he almost dropped her after giving her a bath. The squeezing incident occurred approximately three weeks before August 8. He denied ever having kicked S.G.

Defendant said he saw Phillips throw S.G. on the bed when frustrated. He saw her put S.G. in the closet alone when she was crying. She told him she hated S.G. Defendant

did not confront Phillips about her behavior because he did not want to get into an argument.

He said he did not call an ambulance on the morning of August 8, even though S.G.'s lips and fingers were blue and she was not breathing properly, because Phillips said they could not go with the baby in the ambulance.

When the interviewing officer said he thought both defendant and Phillips had each injured S.G., defendant did not disagree. He agreed he was "responsible for some of the things that happened to S.G." He also conceded that the amount of time he spent with S.G., three or four days at a time, was sufficient to notice physical changes in the baby and that she was not properly gaining weight.

F. Trial Proceedings

An April 2008 information charged defendant with eight separate counts: (1) torture (§ 206); (2) corporal injury to a child, acute rib fractures (§ 273d, subd. (a)); (3) corporal injury to a child, non-acute rib fractures (§ 273d, subd. (a)); (4) corporal injury to a child, femur fracture (§ 273d, subd. (a)); (5) corporal injury to a child, tibia fracture (§ 273d, subd. (a)); (6) corporal injury to a child, cuts in fingers (§ 273d, subd. (a)); (7) child abuse/endangerment, diaper rash (§ 273a, subd. (a)); and (8) child abuse/endangerment, failure to seek medical care (§ 273a, subd. (a)). Great bodily injury enhancements under section 12022.7, subdivision (d) were alleged for each count of corporal injury to a child.

At trial, defendant testified on his own behalf. He told the jury that he would visit Phillips every weekend or every other weekend and stay for a few days.

Defendant first noticed something was wrong with S.G. about two or three days after they returned on July 30 from the American Idol audition. Her leg was swollen and bruised. He then said he noticed her swollen leg on July 31, the day after they got back from the audition. He did not see any injuries or cuts to her fingers. He denied ever

having seen S.G. spit up blood, but later admitted seeing "reddish/pinkish" in her saliva upon returning to Stockton on July 30. He did not notice any other injuries, and only discovered her diaper rash on August 8.

Defendant denied ever abusing S.G., and maintained he did not know how she was injured. He denied ever biting S.G.'s fingers, but admitted he "always nibble[d]" when he played with the baby. Although he had heard Phillips scream at the baby and witnessed Phillips grab her older daughter by the leg, he said he never saw Phillips physically harm S.G.

He testified he waited at the Stockton hospital for approximately three hours. He left and ran from police because he was shocked and scared.

The People proffered two theories of liability for S.G.'s injuries: that defendant was the direct perpetrator or was an aider and abettor. The prosecution's main theory was that defendant personally inflicted the injuries on S.G. During closing argument, the prosecutor argued that the jury could find defendant guilty of the great bodily injury enhancements attached to each corporal injury to a child charge if it found beyond a reasonable doubt that defendant personally inflicted the respective injuries. If the jury found defendant did not personally inflict any of those injuries, then the prosecutor argued the jury could rely on the alternative aider and abettor theory to convict on the underlying charge but not on the special enhancement. The prosecution also argued that the charges for child abuse/endangerment based on the diaper rash and failure to seek medical care were stand-alone charges, meaning that defendant was liable as the direct perpetrator and not as an aider and abettor.

The court used CALJIC Nos. 3.01 and 1.40, CALCRIM Nos. 400 and 401, and a special "either/or" instruction based on *People v. Culuko* (2000) 78 Cal.App.4th 307 (*Culuko*), to instruct on aiding and abetting. Those instructions are discussed more fully below.

The jury convicted defendant of all charges. The jury found true the great bodily injury enhancements alleged under section 12022.7, subdivision (d) for the corporal injury to a child counts based on the acute and non-acute rib fractures and for the cuts to S.G.'s fingers. It found the great bodily injury enhancements attached to the counts for the femur and tibia fractures not true. The court sentenced defendant to an aggregate term of life with the possibility of parole plus a determinate term of seven years, four months.

DISCUSSION

I

Claims of Instructional Error

Defendant argues the court twice erred in instructing the jury on aider and abettor liability, asserting that certain aider and abettor instructions were not supported by the evidence, and others misstated the mens rea of an aider and abettor. He contends these errors, both singularly and cumulatively, prejudicially relieved the People of its burden of proof on which acts of abuse defendant aided and abetted and denied him a fundamentally fair trial. We consider each alleged instructional error below.

A. CALJIC Nos. 3.01 and 1.40

A court has a duty to instruct on the general principles of law relevant to the issues raised by the evidence in a criminal case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) A necessary corollary to this well established rule is that, to avoid confusing or misleading the jury, a court must not instruct on irrelevant principles of law. (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) It is this latter correlative principle that defendant contends the court violated when it gave a modified version of CALJIC No. 3.01 and CALJIC No. 1.04.

The court gave the following instruction based on CALJIC No. 3.01:

"A person aids and abets the commission of a crime when he or she: [¶] One, with knowledge of the unlawful purpose of the perpetrator; [¶] And, two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime; [¶] And, three, by act or advice or by omitting or failing to act in those situations where a person is under a legal duty to act, aids, promotes, encourages, or instigates the commission of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime, does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed, and, in the absence of a legal duty, the failure to prevent it does not amount to aiding and abetting."

The court also instructed the jury, pursuant to CALJIC No. 1.40, that "A parent has a legal duty to take every step reasonably possible under the then existing circumstances, to protect his or her child from harm, including physical attack. The parent, however, need not risk death or great bodily harm in doing so, and if [*sic*] the case of an attack, the relative size and strength of the parties involved is relevant to a determination of what is . . . every step reasonably possible."

Defendant argues the court erred in so instructing the jury because no evidence established that defendant saw Phillips abuse S.G. According to defendant, the above instructions are based on *People v. Rolon* (2008) 160 Cal.App.4th 1206 (*Rolon*) and *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733 (*Swanson*), which upheld convictions on an aiding and abetting theory of liability based on a parent's duty to protect his or her child from harm. In both cases, the defendants witnessed either physical or sexual abuse of their children but did nothing to stop it. (*Rolon* at p. 1209; *Swanson* at p. 746.)

Defendant contends that, in the absence of any evidence showing he witnessed Phillips abuse S.G., he had no legal duty to protect S.G. from Phillips. Thus, according to defendant, CALJIC No. 3.01 and CALJIC No. 1.40 should not have been given to the jury.

While it is true that the defendants in *Rolon* and *Swanson* each observed acts of abuse against their children and failed to intercede, we do not agree that the principles regarding a parent's duty to protect his or her child articulated in those decisions are as narrow as defendant contends. Neither *Rolon* nor *Swanson* held that a parent can be held liable on an aider and abettor theory *only if* the parent actually witnesses specific instances of abuse. Such an unduly narrow reading of *Rolon* and *Swanson*, we believe, would contravene well settled law that a person may aid and abet a crime without being physically present. (See *People v. Bohmer* (1975) 46 Cal.App.3d 185, 199 ["It is not necessary that one be physically present when a crime is committed to abet or encourage its commission"].)

Rolon and *Swanson* are best understood in the context of a parent's required *knowledge* of a potential danger to his child and a failure to take reasonable steps to protect his child despite such knowledge. As *Rolon* found, "parents have a common law duty to protect their children and may be held criminally liable for failing to do so: a parent who *knowingly* fails to take reasonable steps to stop an attack on his or her child may be criminally liable for the attack if the purpose of nonintervention is to aid and abet the attack." (*Rolon, supra*, 160 Cal.App.4th at p. 1219, italics added.) Although knowledge of a fact can be gained from direct observation, like witnessing someone strike a child, it can also be acquired through other means, such as circumstantial evidence of unexplained wounds or injuries. (See e.g., *K.F. v. Superior Court* (2014) 224 Cal.App.4th 1369, 1382 [in dependency proceeding, circumstantial evidence sufficient to show father either committed abuse or was in a position to know about the abuse]; *People v. Yrigoyen* (1955) 45 Cal.2d 46 [circumstantial evidence relied upon to show criminal knowledge].) This is especially so for a victim as young as S.G., since as Dr. Crawford recognized, weeks old infants do not often injure themselves.

A recent decision by our colleagues in the Second District supports this conclusion. In *People v. Ogg* (2013) 219 Cal.App.4th173, 182, the court rejected the

argument that a parent cannot be guilty of aiding and abetting because she was not present when the perpetrator committed his crimes against her child. There, a man the defendant dated and later married sexually abused her daughter while the defendant was not present. (*Id.* at pp. 177-178.) Although the defendant initially denied it, defendant's daughter later told her mother about the abuse. (*Ibid.*) The defendant did nothing. (*Id.* at pp. 178-179.) The fact that, up until then, there had been "no reported California decisions directly on point" did not persuade the court that defendant could not be guilty as an aider and abettor even though she had not witnessed the sexual abuse. (*Id.* at p. 182.)

We agree with *Ogg's* rejection of the argument that a person "cannot be [found] guilty of aiding and abetting [child abuse] because [the person] was not present when [another person]" committed child abuse. (*Ogg, supra,* at p. 182.) That defendant claims he never saw Phillips harm S.G. does not mean his testimony was believable. Defendant made several false or misleading statements to police regarding S.G.'s injuries and when he learned of them. On this basis, the jury was entitled to disbelieve some or all of defendant's testimony and it was so instructed. (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1130 [a jury may "disbelieve a witness who deliberately lies about something significant because experience has taught us that a deliberate liar cannot be trusted"].)

This is especially so since S.G. sustained the majority of her injuries when defendant and Phillips were constantly together.

Nor does defendant's arguably implausible claim that he never saw Phillips hurt S.G. mean he was unaware S.G. was being mistreated, and even seriously injured. Defendant himself said he saw Phillips neglect the baby and shut her in the closet alone when she cried. He admitted seeing Phillips throw S.G. on the bed in frustration. She told him that she hated S.G. and that she was not their child. He also witnessed Phillips screaming at the baby, and even saw Phillips shove their older daughter's head under the water in the bath tub when she would not stop crying. Defendant also repeatedly

described Phillips's violent tendencies over the course of their tumultuous relationship. Defendant nonetheless continued to leave S.G. alone with Phillips for days at a time when he returned to Morgan Hill.

The physical evidence, moreover, showed S.G. sustained the broken femur, tibia fracture, acute rib fractures, the deep lacerations to her fingers, and her severe diaper rash the week before she was brought to the hospital on August 8. The femur fracture alone would have been incredibly painful and resulted in extreme swelling of S.G.'s left thigh. The acute rib fractures, which resulted in chest flail, were also extremely painful and likely rendered S.G. unable to breathe almost immediately after the injury. Dr. Crawford testified that clicking or popping sounds would have been heard when holding the child.

Defendant was with S.G. during this time frame, and he and Phillips were the only people who cared for the baby. He admitted he knew the child was malnourished and that she needed medical attention, but he did not take her to the doctor because he wanted to avoid an argument with Phillips. Thus, even if the jury believed defendant's testimony that he never abused S.G., which for the acute and nonacute rib fractures and the finger cuts it clearly did not, the physical signs that Phillips was abusing her were abundantly clear. That defendant ignored those obvious signs of abuse supports the inference that defendant chose to facilitate the abuse rather than cause an argument with Phillips or end his relationship and seek custody of his children in order to protect them. (*Ogg, supra,* 219 Cal.App.4th at p. 181 ["Substantial evidence supports the inference that Ogg chose to facilitate the abuse rather than sever her relationship with Daniel"].)

Based on the evidence presented, the theory that defendant was guilty as an aider and abettor for knowingly failing to take reasonable steps to protect S.G. from Phillips's abuse was a relevant principle of law and amply supported by the record. The court, then, did not err in giving the above instructions even if the jury believed defendant that he did not actually see Phillips strike a blow to S.G.

B. CALCRIM No. 400 and the *Culuko* "Either/Or" Instruction

Defendant next contends the court erred in instructing the jury with a former version of CALCRIM No. 400 and with the *Culuko* "either/or" instruction, both of which stated that a direct perpetrator and an aider and abettor are "equally guilty" of the underlying crime. Defendant says the instructions improperly stated the required mens rea for an aider and abettor.

The introductory instruction to the series of instructions on aiding and abetting, CALCRIM No. 400, as given in this case, provides: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." We note that in April 2010, CALCRIM No. 400 was amended to remove the "equally guilty" language. (Judicial Council of Cal., Crim. Jury Instns. (2011) p. 167; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1119, fn. 5 (*Lopez*).)

The special *Culuko* "either/or" instruction given by the court in part contains similar language: "Those who aid and abet a crime and those who directly perpetrate the crime are principals and equally guilty of the commission of that crime." (See *Culuko, supra,* 78 Cal.App.4th at pp. 323-324.)

Generally, a person who is found to have aided another person to commit a crime *is* "equally guilty" of that crime. (*Lopez, supra,* 198 Cal.App.4th at p. 1118 (*Lopez*) [citing § 31; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, pp. 122-123, italics added].) Under certain circumstances, however, an aider and abettor may be found guilty of a greater or lesser crime than the perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1114 (*McCoy*) [an aider might be found guilty of first degree murder, even if shooter is found guilty of manslaughter on unreasonable

self-defense theory]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578 [aider might be guilty of lesser crime than perpetrator, where ultimate crime was not reasonably foreseeable consequence of act aided, but a lesser crime committed by perpetrator during the ultimate crime was a reasonably foreseeable consequence of the act aided].)

"Because the instruction as given was generally accurate, but potentially incomplete in certain cases, it was incumbent on" defendant to request a modification if he thought it was misleading on the facts of this case. (*Lopez, supra,* 198 Cal.App.4th at p. 1118.) His failure to do so forfeits the claim of error. (*Id.* at p. 1119; see also *People v. Lang* (1989) 49 Cal.3d 991, 1024 [party may not claim "an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"]; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163-1165 (*Samaniego*) [challenge to CALCRIM No. 400 forfeited for failure to seek modification]; but see *People v. Nero* (2010) 181 Cal.App.4th 504, 517-518 (*Nero*) [construing CALJIC No. 3.00, also using the "equally guilty" language, and finding it can be misleading "even in unexceptional circumstances"].)

In any event, we see no prejudice. We are convinced beyond a reasonable doubt the jury verdict would have been the same even if the jury had been told that, under certain circumstances, an aider and abettor may be found guilty of a greater or lesser crime than the perpetrator, especially in light of the fact that we find no such circumstances here. " 'An instruction that omits or misdescribes an element of a charged offense violates the right to jury trial guaranteed by our federal Constitution, and the effect of this violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]. [Citation.]' " (*Nero, supra*, 181 Cal.App.4th at pp. 518-519.)

To the extent defendant contends the instruction reduced the People's burden of proof by eliminating the need to *prove* defendant's intent, we disagree. (*Lopez, supra*, 198 Cal.App.4th at p. 1119.) "Jurors are presumed able to understand and correlate

instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Other instructions elaborated on the requisite intent.

CALCRIM No. 401, as given in this case, provided in part:

"To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

By stating that defendant could only be convicted as an aider and abettor if the jury found he specifically intended to aid the direct perpetrator's crime and knew the direct perpetrator's unlawful purpose, CALCRIM No. 401 properly advised the jury that it could not disregard defendant's own mens rea for aider and abettor liability purposes. Thus, "even if we were to accept [defendant's] premise that CALCRIM No. 400 impairs the intent element, the error was harmless because the point was covered elsewhere." (*Lopez, supra,* 198 Cal.App.4th at p. 1120 [citing *People v. Stewart* (1976) 16 Cal.3d 133, 141; *Samaniego, supra,* 172 Cal.App.4th at p. 1165.)

The jury, moreover, found true the special allegations that defendant personally inflicted great bodily injury on S.G. by breaking her ribs and cutting her fingers. For those counts of corporal injury to a child, then, the jury found defendant was the direct perpetrator and not an aider and abettor. While the jury found the great bodily injury enhancements for the femur and tibia fractures not true, and thus likely relied on an aider and abettor theory of liability for those counts given the prosecutor's closing argument,

we conclude, as noted above, that the totality of the instructions given, including CALCRIM No. 401, sufficiently covered the requisite intent element for those charges.

As the prosecution and defense both recognized below, the child abuse/endangerment counts concerning the diaper rash and the failure to seek medical attention were "stand alone" counts. In other words, defendant was accountable for his own actions, or inactions, regardless of Phillips's conduct. Aider and abettor liability therefore played no part in finding defendant guilty of those charges.

Finally, we note that torture is a specific intent crime. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1573.) " 'When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." ' " (*McCoy, supra,* 25 Cal.4th at p. 1118.) In the context of a torture charge, what this means is that the aider and abettor must know and share the tortuous intent of the actual perpetrator. (*Ibid.* [explaining that, in the context of a murder or attempted murder charge, when guilt does not depend on the natural and probable consequences doctrine, the aider and abettor must know and share the actual perpetrator's murderous intent].) In other words, the jury had to have found defendant intended "to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose," even if he was an aider and abettor. (§ 206; *McCoy* at p. 1118.)

Defendant also argues that language in the *Culuko* "either/or" instruction that the jury need not unanimously agree whether defendant was the aider and abettor or was the direct perpetrator was erroneous because the principle is incompatible with the Supreme Court's decision in *McCoy*. The portion of the instruction of which defendant complains provides: "You need not unanimously agree, nor individually determine, whether a defendant is an aider and abettor or a direct perpetrator. [¶] The individual jurors themselves need not choose among the theories, so long as each is convinced of guilt.

There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other." (See *Culuko, supra,* 78 Cal.App.4th at pp. 323-324.)

As noted above, *McCoy* held that direct perpetrators and aiders and abettors can be guilty of different crimes depending on the circumstances. (*McCoy, supra,* 25 Cal.4th at p. 1114.) Defendant essentially contends *McCoy* implicitly overruled a litany of aider and abettor precedent stating that a jury need not unanimously agree on whether a defendant was an aider and abettor or a direct perpetrator. *McCoy* cannot be so read.

McCoy itself recognized that the aider and abettor doctrine "obviates the necessity to decide who was the aider and abettor and who [was] the direct perpetrator or to what extent each played which role." (*McCoy, supra,* 25 Cal.4th at p. 1120.) Had the Supreme Court intended to overrule this established principle of law, it would have said the opposite. Notably, in *People v. Smith* (2014) 60 Cal.4th 603, 617-618, the Supreme Court cited with approval the principle that unanimity is not required in the aider and abettor/direct perpetrator context. And, it even cited *Culuk*o as support. (*Id.* at p. 619.) The language in the "either/or" instruction regarding unanimity, then, was a correct statement of the law. (*Culuko, supra,* 78 Cal.App.4th at p. 323; *Smith, supra,* 60 Cal.4th at pp. 618-619.)

Because we conclude the court did not err in giving CALJIC Nos. 3.01 and 1.04 as those instructions were relevant under the facts of the case, and that any alleged errors in CALCRIM No. 400 and the *Culuko* either/or instruction were harmless, assuming for sake of argument that defendant did not forfeit his challenge, we reject defendant's cumulative instructional error argument.

II

Sufficiency of the Evidence

Defendant insists his conviction for torturing S.G. must be reversed because insufficient evidence established that he inflicted great bodily injury on her while intending to cause cruel or extreme pain for "any sadistic purpose" under section 206. He also claims he had no motive to cause his child such cruel and extreme pain for revenge, extortion, or persuasion. We disagree and find the evidence of torture sufficient.

When considering a sufficiency of the evidence challenge, we must " ' "review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence--i.e., evidence that is credible and of solid value--from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." ' " (*People v. Hill* (1998) 17 Cal.4th 800, 848-849 (*Hill*).) We may not reweigh the evidence or substitute our judgment for that of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[O]ur opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment." (*Hill* at p. 849.) Reversal for insufficient evidence is warranted only where it clearly appears that upon no hypothesis whatever is there sufficient evidence to support a conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Massie* (2006) 142 Cal.App.4th 365, 371 (*Massie*).)

Section 206 defines torture. The statute partly provides: "[e]very person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture." (§ 206.) For purposes of section 206, the phrase "sadistic purpose" means "[inflicting] pain on another person for the purpose of experiencing pleasure." (*People v. Raley* (1992) 2 Cal.4th 870, 901.) While the phrase can include sexual pleasure, "a 'sadistic purpose' need not be

sexual in nature . . . ." (*People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1203.) The terms revenge, extortion, and persuasion are "self-explanatory." (*Massie, supra,* 142 Cal.App.4th at p. 371.)

Torture does not require that an individual act with premeditation and deliberation. (*Massie, supra,* 142 Cal.App.4th at p. 371.) Nor does it require the infliction of prolonged pain. (*Ibid.*) Thus, "the length of time over which the offense occur[s] is relevant but not necessarily determinative." (*Ibid.*) The severity of the wound inflicted is likewise relevant but not determinative. (*Ibid.*)

Because the intent with which a person acts is rarely susceptible of direct proof, it usually must be inferred from facts and circumstances surrounding the offense. (*Massie, supra,* 142 Cal.App.4th at p. 371; *People v. Pre* (2004) 117 Cal.App.4th 413, 420 (*Pre*).) The nature and extent of the injuries may be considered in assessing a defendant's intent. (*Pre* at p. 424.)

Here, defendant claims he had no "motive" for revenge against S.G., but Phillips did because she did not want to be tied down with two young children and instead wanted a different career. Defendant also asserts that it is more reasonable to infer Phillips, rather than himself, had a sadistic purpose in harming S.G. since he cared for his elderly parents and had other children who had not been abused. He posits that a more reasonable inference is that after Phillips broke S.G.'s leg, he inferred Phillips had injured the child but took no action hoping it would heal without medical care.

Defendant's arguments fundamentally misapprehend our limited role in reviewing sufficiency of the evidence challenges. We do not consider the evidence in the light most favorable to defendant as the above theories do, but in the light most favorable to the judgment. (*Hill, supra,* 17 Cal.4th at p. 848.) If there is any hypothesis supported by sufficient evidence, we are duty bound to uphold the conviction. (*Massie, supra,* 142 Cal.App.4th at p. 371.) As one court has noted, "[c]onvictions are seldom reversed based on insufficiency of the evidence." (*Pre, supra,* 117 Cal.App.4th at p. 421.)

Reviewing the record discloses at least one hypothesis to uphold defendant's torture conviction. The jury specifically found that defendant personally inflicted both the acute and nonacute rib fractures as well as the cuts to S.G.'s fingers, which nearly severed her tendons. Thus, the jury necessarily found defendant directly perpetrated these injuries. The nature and extent of these injuries, we believe, are sufficient to infer that defendant harbored the intent to inflict extreme pain and suffering on S.G. for his own pleasure. (*Pre, supra,* 117 Cal.App.4th p. 424.)

The older rib fractures occurred between two and four weeks before defendant and Phillips took S.G. to the hospital. Thus, at the earliest, S.G. suffered the nonacute rib injuries around July 11. The newer rib fractures, which caused her chest to flail and severely hampered her ability to breathe, were inflicted the week before arriving at the hospital. The various stages of healing of the acute and nonacute rib fractures shows that defendant inflicted the injuries during different episodes of abuse. During these two distinct periods, separated by at least a week and maybe longer, defendant had ample time to reflect upon his conduct but nevertheless inflicted the same injury again. (*Massie, supra,* 142 Cal.App.4th at p. 373 [breaks in between defendant's violent outbursts supported jury's finding that defendant intended to inflect cruel or extreme pain because defendant had time to reflect on his conduct].) Defendant's flight from the hospital and evasion of police for several days further supports a consciousness of guilt inference. (*People v. Bonilla* (2007) 41 Cal.4th 313, 328 [consciousness of guilt inference proper where evidence shows defendant departed the crime scene under circumstances suggesting that his movement was motivated by a purpose to avoid being observed or arrested].)

At only seven weeks old, S.G. was particularly vulnerable. She was even younger, possibly three to five weeks old, when the first rib injuries were inflicted. The area of the rib injuries is also particularly vulnerable. As Dr. Crawford explained, the rib cage protects the lungs and when severely damaged cannot support the breathing functions

necessary for survival. Broken ribs are also incredibly painful given that, unlike other broken bones, such as an arm, a person cannot stop using his lungs to breathe while the injury heals. And this is especially so in this case since the same area was twice injured. (*People v. Assad* (2010) 189 Cal.App.4th 187, 196 [a person who deliberately strikes his victim on an area of the body that is already injured has the intent to cause severe pain].)

Like the ribs, a child's fingers are a sensitive body part. They provide a critical function in his or her growth and development. Babies learn through touch; they eventually feed themselves with their fingers. One cannot do that when the tendons in one's fingers have been nearly severed as result of being bitten.

In *Pre*, the court found it was reasonable to infer the defendant intended to inflict extreme pain on his unconscious victim for his own pleasure from bite marks to the victim's ear and back. (*Pre, supra,* 117 Cal.App.4th at p. 422.) Like the unconscious victim in *Pre*, at only seven weeks old, S.G. had no chance of fighting off the biting attack which nearly severed the tendons in her fingers. Nor could she protect herself from the traumatic rib injuries.

The jury also heard evidence that defendant repeatedly tried to appease Phillips. Although the family was poor and had no money, he took his parent's van without permission and drove her to San Diego to audition for American Idol. He recognized S.G. was malnourished and needed medical treatment, but did not take her to the hospital or to see a doctor because he wanted to avoid fights or confrontations with Phillips. Defendant himself said Phillips hated S.G., and that she neglected and treated the baby terribly. Yet he did nothing. Given this evidence, the jury could have reasonably inferred that defendant intended to and did inflict extreme pain and suffering on S.G. to appease Phillips and make his personal life easier.

When viewing the evidence in the proper light--one most favorable to the judgment--the jury was amply justified in convicting defendant of torture. We therefore reject defendant's insufficient evidence challenge.

III

Sentencing Errors

Defendant contends the court erred during sentencing when it imposed different amounts for the parole revocation fine and the restitution fine, imposed a $24 surcharge on the restitution fine, and stayed the $40 court security fee and the $30 court assessment fee on counts 2 through 6. The People concede the issues, and we accept the People's concession. We briefly discuss each conceded error below.

At sentencing, the court imposed a $240 restitution fine and a $200 parole revocation fine. But the amount of each fine must be the same. (*People v. Smith* (2001) 24 Cal.4th 849, 851; §§ 1202.4 & 1202.45.)

At the time defendant was sentenced in May 2012, section 1202.4, subdivision (b) provided that the restitution fine could be no less than $240. (§ 1202.4, subd. (b)(1).) Because the parole revocation fine must be the same as the restitution fine, it also had to be $240. (§ 1202.45, subd. (a).) While the abstract of judgment states the restitution fine and the parole revocation fine are each $240, the court's oral pronouncement of judgment controls. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) We therefore modify the judgment to impose a $240 parole revocation fine suspended unless parole is revoked. Because the abstract of judgment already states that both fees are $240, it need not be amended in this regard.

The court also imposed a $24 surcharge on the restitution fine. Surcharges do not apply to restitution fines, however. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1372.) We shall therefore strike the $24 surcharge on the restitution fine and order the abstract of judgment amended accordingly.

The court imposed and stayed a $40 court security fee and a $30 court assessment fee for counts 2 through 6, which were stayed under section 654. Facility assessment fees and court security fees are mandatory and may not be stayed even for counts stayed

pursuant to section 654. (*People v. Woods* (2010) 191 Cal.App.4th 269, 273; *People v. Sharret* (2011) 191 Cal.App.4th 859, 865-870.) We shall modify the judgment accordingly and order amendment to the abstract of judgment.

Defendant finally argues the court erred in calculating his custody credits. With no citation to the record, and only a string cite with no discussion of authority, defendant contends his "credits do not appear to reflect the period of time he was in Penal Code section 1368 confinement in the state hospital." He does not identify the number of credit days to which he believes he is entitled.

An appellate court has no obligation to search the record to find evidence to support an appellant's contentions. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.) Defendant's failure to adequately cite the record forfeits consideration of the custody credit issue.

DISPOSITION

The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting the modified sentence and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

HULL, J.

We concur:

NICHOLSON, Acting P. J.

MURRAY, J.